SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 7, 2007   DEPT. 71   **REPORTER:**
                                        CSR#:

HON. RONALD S. PRAGER,   **REPORTER'S ADDRESS:**
      JUDGE PRESIDING   P. O. Box 128
                                        San Diego, CA 92112-4104

CLERK: K. Sandoval

BAILIFF:

Judicial Council	Coordination Proceeding
Coordination Proceedings	Title [Rule 1550(b)]
No. JCCP 4041	TOBACCO CASE

TENTATIVE RULING: The Court rules on plaintiff/cross-defendant People of the State of California ("People") and Cross-Defendant National Association of Attorneys General's ("NAAG") motion for protective order or, in the alternative, motion to quash deposition notices as follows:

The motion is granted for the reasons stated below.

First, the People and NAAG met there burden of showing good cause under Code of Civil Procedure sections 2025.410 subd. (c) and 2025.420 subd. (b) by demonstrating the applicability of *Spectra-Physics Inc. v. Super. Ct.* (1988) 198 Cal.App.3d 1487 (hereafter "*Spectra-Physics*") to this case.   Therefore, the burden shifted to defendant U.S. Smokeless Tobacco Company ("USSTC") to show that each of the three prongs of the test has been met.

Second, contrary to USSTC's assertion, being trial counsel is not a prerequisite to the applicability of *Spectra-Physics.*   (*Desert Orchid Partners v. Transaction Systems Architects, Inc.* (D. Neb. 2006) 237 F.R.D. 215, 220.)

Third, USSTC did not meet the requirements of the *Spectra-Physics* test for the reasons stated below.

The practice of taking the deposition of an adverse party's attorney is discouraged absent "extremely good cause." (*Fireman's Fund Ins. Co. v. Super. Ct.* (1977) 72 Cal.App.3d 786, 790 and *Carehouse Convalescent Hospital v. Super. Ct.* (2006) 143 Cal.App.4th 1558, 1562.) Thus, the party seeking the deposition of adverse counsel has the burden to show that (1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and not privileged, and (3) the information

is crucial to the preparation of the case. (*Spectra-Physics, supra,* 198 Cal.App.3d at p. 1494.)

With respect to the first prong, USSTC contends that it is entitled to discovery by taking the depositions of attorneys Dennis Eckhart, William Lieblich, and Michelle Hickerson since any other means would impose an undue burden, citing *Meritplan Ins. Co. v. Super. Ct.* (1981) 124 Cal.App.3d 237. However, the first prong of the three-part test requires that no other means exist to obtain information. (*Id.* at p. 1494.) USSTC failed to demonstrate that this is the case here. USSTC was present and so has first-hand knowledge of what happened in the meet-and-confer meetings and other communications between it and the People, NAAG, and other Settling States. Furthermore, it failed to try to obtain the information it seeks by other means (i.e., interrogatories, requests for admissions).

With respect to the second prong, USSTC contends that the Court must apply a subjective standard for evaluating good faith, citing *Storek & Storek, Inc. v. Citicorp. Real Estate, Inc.* (2002) 100 Cal.App.4th 44,. However, the test is subjective where the part can make a purely subjective decision (i.e., one of taste or where the parties agree that the decision will be subjective) but is objective where the question is whether a party is complying with the terms of a contract. (*Storek, supra,* 100 Cal.App.4th at pp. 60-61.) The STMSA falls into the latter category. Furthermore, the STMSA is the final contract, with only a meet-and-confer provision on alleged violations only "[w]herever possible." (STMSA, §VII(c)(6), p. 42.) Thus, there is no obligation to negotiate some level of compliance less than required by the STMSA.

With respect to the third prong, USSTC failed to make a sufficient showing that the information sought is crucial to its Cross-Complaint.

However, the Court finds that it would be premature to make a determination as to the applicability of the privileges asserted by the People and NAAG since to do so now would force the Court to make a determination in the abstract.

IT IS SO ORDERED.